BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Noranda Aluminum, Inc, et al.,	)	
	)	
Complainants,	)	
	)	
v.	)	File No. EC-2014-0224
	)	
Union Electric Company, d/b/a Ameren Missouri	)	
	)	
	)	
Respondent.	)	

AMEREN MISSOURI'S OBJECTION TO
NON-UNANIMOUS STIPULATION AND AGREEMENT

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company"), and pursuant to 4 CSR 240-20.115, hereby objects to the *Non-Unanimous Stipulation and Agreement* filed on July 29, 2014 on behalf of the Office of the Public Counsel ("OPC"), Noranda Aluminum, Inc. ("Noranda"), the Consumers Council of Missouri ("CCM") and the Missouri Industrial Energy Consumers ("MIEC"), and with respect to its objection states as follows:

1. The evidentiary record in this case closed on June 17, 2014. The briefing provided for by the Commission's rules and in the agreed-upon and Commission-ordered procedural schedule in this case was completed on July 15, 2014. Based on that evidentiary record and those briefs, a unanimous Commission indicated at its public agenda session on July 23, 2014 that it expected to deny Noranda's Complaint.

2. The next day, OPC filed what it denominated as a "Non-Unanimous Stipulation and Agreement," which, as we explained in our July 25, 2014 Response was neither a stipulation nor an agreement and was instead an improper, unauthorized third post-hearing brief that articulated for the first time material changes in positions the OPC has taken in this case. No other party besides OPC supported this "stipulation."

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3. On July 29, 2014 OPC, this time joined by Noranda, CCM and MIEC, filed the Non-Unanimous Stipulation that is the subject of this objection. While it arguably qualifies as a stipulation insofar as it reflects an apparent agreement between multiple parties, it too, submitted at this stage of the case, is in effect now a fourth unauthorized post-hearing brief by OPC (and a third post-hearing brief by the other signatories), that attempts to create a case that isn't before the Commission. Complainants[1] did not ask for the relief for which they now advocate. As we explained in our Reply Brief (pages 7-8), the Complaint frames the basis for Noranda's flawed claim that its current rate is unjust and unreasonable and the Complaint defines the relief that is sought in this case. Just as OPC could not manufacture a different complaint and a different request through its July 24 filing, for the reasons discussed in our July 25, 2014 response, neither can the signatories to the current Non-Unanimous Stipulation do so now.

4. Not only would it be completely improper to entertain an entirely different request for relief than the one presented by the Complaint (and tried by the parties), but the proposed resolution of the case reflected in the latest stipulation is flawed in any event.

5. First, the Non-Unanimous Stipulation reveals yet another instance where Noranda has apparently exaggerated in an effort to extract a subsidy from Ameren Missouri's other customers now that it and its owner have stripped the company of hundreds of millions of dollars of cash. Just nine days ago – after hearing the Commission's July 23 agenda discussion – Noranda CEO Kip Smith filed another affidavit in this docket claiming that "[i]f we do not get the $30 per MWH power rate **[redacted].** Mr. Smith went on to then claim that **[redacted].** But here we are, nine days later, and Noranda is now telling the

[1] Noranda Aluminum and the 37 individual complainants (collectively, "Noranda').

[2] Of course who knows if this would be true? Noranda thought it would have $20 million less available under its ABL because of a trigger of its FCCR at the end of 2013 as well, but was mistaken. Tr. p. 390, l. 10 – 15 (Mr. Smith noting that when Noranda developed its 2014 Plan it thought it would not meet the required FCCR coverage ratio, but in fact it did meet it, freeing up an additional $20 million of liquidity.)

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Commission that a rate of $34.44 for the next five years is acceptable. So which is it, must Noranda have a $30 per MWh rate, as it insisted every day since this case was filed through the filing of its Reply Brief on July 15 and through July 23 when Mr. Smith filed his second affidavit, or were the numbers always so pliable that $34.44 would do? And if so, would $36 do? How about $37? And does Noranda really "need" a two percent per rate case cap, or does it just want the subsidy to grow as overall rates increase over time at a rate of more than two percent each rate case? And must it really avoid paying the fuel costs incurred to serve it?

6. The absurdity that this case has become in view of these 11th hour filings is obvious when one starts to consider the myriad of questions that are raised by Noranda's ever-evolving position. Perhaps Noranda's need has changed because of the fact that as of July 25, 2014 LME futures were between $0.92 and $0.96 per pound[3] for the rest of 2014 and for 2015 as compared the $0.823 and $0.865 per pound used by Mr. Smith to justify his claim that Noranda must have the $30 per MWh rate. And perhaps the need has changed because the Midwest premium ("MWP") through late 2015 ranges from $0.1725 to $0.19735 per pound[4] versus the MWP relied upon by Mr. Smith, which was much lower at $0.118 to $0.152 per pound. Taking roughly the midpoint of each yields an aluminum price of approximately $1.12 per pound – about $0.14 per pound more than Mr. Smith assumed for 2014 – 2015. Noranda itself tells us that a penny increase in aluminum prices adds about **[redacted]** of EBITDA, and this increase would yield about **[redacted]** (about **[redacted]** of incremental cash) if such prices were realized for one year.[5] Now the truth is that it is not proper for the Commission to rely on any of this post-hearing information in deciding this case, but the same can be said of Mr. Smith's affidavit and of the Stipulation. However, it is fair to note that, like the first "stipulation," the latest

[3] Bloomberg, July 25, 2014.

[4] *Id.*

[5] Tr. p. 359, l. 20-25 (Mr. Smith agreeing that a 1 cent change in aluminum prices equates to about **[redacted]** in EBITDA); Tr. p. 271, l. 5 to p. 272, l. 1 (Mr. Smith acknowledging that to get cash generated by EBITDA you multiply the EBITDA by approximately .62 (1minus the tax rate of approximately .38).

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Stipulation has no provision allowing customers to share in any upside if aluminum prices recover, or Noranda's financial condition improves. Also, like the first one, the latest version would not prevent Noranda from continuing to provide dividends to its shareholders, even as it enjoys rates that are heavily subsidized by Ameren Missouri's other customers.

7. Not only does the Stipulation raise many unanswered questions, but its terms are flawed and unreasonable in other respects. In OPC's July 24 "stipulation," if Noranda failed to meet the conditions OPC proposed Noranda would have to repay the lower rate it had received. As we pointed out in our July 25 response, there were practical concerns about whether repayment would actually occur and legal problems with the disposition of the funds OPC proposed, but under the first "stipulation" (at least in theory), Noranda would not have been able to take the subsidy and then fail to meet the commitments, with essentially no recourse for the Commission or Ameren Missouri's other customers because at least the first "stipulation" contained a repayment provision, unenforceable as it was. The current Stipulation is void of any attempt at putting in place a mechanism to recoup subsidies received by Noranda if Noranda failes to meet one or more of the conditions, and it is clear that under the current Stipulation Noranda is entitled to keep the full amount of any subsidy it would have received even if it does not meet those condtions.

8. A second significant flaw is that while Noranda would have to invest $35 million in its New Madrid operation in year one, it would only have to invest an *average* of $35 million in years two to five. But that scheme would allow Noranda to invest far less in years two to four, and then if it failed to invest enough later to reach the average all that would happen is that it would lose the heavily subsidized rate on a prospective basis.[6] In other words, even if Noranda invested nothing in years 2-4, it would not fail to meet its commitment until year 5, and lose its subsidized rate prospectively, after year 5.

[6] Make no mistake: $34.44 with no FAC initially remains a very heavily-subsidized rate, about 17% below Noranda's current rate. Once the latest FAC adjustment takes effect starting with the October billing month, the subsidy would be approximately 20% below what Noranda should be paying.

9. Third, Noranda clearly wants to avoid any meaningful oversight of its compliance with the conditions reflected in the Stipulation. The terms of the Stipulation would prevent the Company from accessing the surveillance reports and other filings Noranda would have to make as part of its reporting on its compliance with the conditions. Ameren Missouri is the only party in this case who investigated Noranda's financial claims. The change to the Stipulation appears to reflect Noranda's hope that the parties who did not have the time or capacity to examine Noranda's finances in this case also will not do so (or will not be able to do so) later after such reporting is submitted. In effect, Noranda wants to deprive the Ameren Missouri of information relevant to whether one of its customers would be in compliance with the tariff under which that customer takes service. Moreover, Noranda seeks to handcuff the Commission by dictating that the Commission must decide any claim that Noranda has not met one or more of the conditions within just 30 days. This is an obvious attempt to prevent any party, including the Staff or OPC, from conducting any meaningful discovery or from there otherwise being any meaningful adversary process to test Noranda's claims. And on what authority could Staff or OPC conduct discovery in any event? Noranda is not a public utility. As we explained in our Initial Brief, Noranda is not the kind of person, corporation or public utility that is within the reach of the Public Service Commission Law. Except when Noranda voluntarily initiates a contested case or intervenes in a contested case (and thus becomes a party to a Commission case on whom discovery can be served or to whom subpoenas could be issued), there is simply no mechanism for discovery on Noranda. So under the scheme the signatories have fashioned, Noranda's reports would have to be taken at face value. This reveals just how hollow the conditions really are. The adversary process reflected in a contested case proceeding with a reasonable schedule is designed to assist the trier of fact (the Commission) in determining and the truth, including providing a process to verify the accuracy of claims parties make. The Stipulation in effect precludes the existence of such a process and likely precludes any fair determination of various facts that would have a direct bearing on whether Noranda is meeting the conditions of its tariff.

10. Finally, we would again note that the signatories had multiple opportunities to state and describe their positions regarding the issues in this case. They should not (and cannot lawfully) be allowed one more opportunity to do so in the guise of a Stipulation and Agreement. Under the Commission's April 16, 2014, *Order Establishing Procedural Schedule*, prior to the evidentiary hearings OPC, CCM and MIEC had the opportunity to file rebuttal and surrebuttal/cross-surrebuttal testimony and to also file detailed statements of position. Indeed, under the Commission's rules, they were required to "include *all* testimony which explains why a party rejects, disagrees *or proposes an alternative* to the moving party's direct case" in their rebuttal testimony (emphasis added). 4 CSR 240-2.130(7)(C). OPC did propose an alternative in surrebuttal testimony (it should have been provided in rebuttal testimony) – MIEC and CCM did not -- but in any event, they can't take yet another bite at the apple now. They had their chance to adduce whatever relevant and otherwise admissible evidence they wanted to, and to advocate and argue for whatever points they wanted to make within the confines of the evidentiary record and the procedural schedule for this case.

11. As we noted before, while the Commission may want to continue to encourage – or at least not completely foreclose – efforts by parties to settle cases after the record closes but prior to a final decision, the latest stipulation does not reflect such an effort. Ameren Missouri has no intention of disregarding several legal realities and facts, including the fact that Noranda's proposal would constitute undue and unlawful discrimination, that the proper place to consider the tax that Noranda's request effectively seeks to impose on others is at the General Assembly, that Noranda failed to carry its burden to establish that it must have a rate subsidy to maintain adequate liquidity, and that Noranda's own mismanagement (and that of its controlling shareholder, Apollo) put Noranda in the position that it claims it is now in. As we believe the Commission recognizes, other customers should not have to bail Noranda out, and if the state believes Noranda needs help (deserving or not), the state as a whole should provide it through proper action of the General Assembly.

12. We reiterate what we said in our prior response: The Commission should, must and indeed has decided this case based upon its duties under the law to fairly process, hear and decide

contested cases before it. The latest Stipulation, like the last, asks the Commission to disregard that process. If it were entertained it would significantly compromise the Commission's contested case processes and the proposal reflected in the Stipulation is, in any event, substantively flawed.

WHEREFORE, for all the reasons stated above, the Commission should disregard the latest Stipulation on grounds that it is improper and seeks relief that violates the Commission's rules and procedural orders, and seeks a resolution of this case that would otherwise be unlawful.

Respectfully submitted,

/s/ James B. Lowery
James B. Lowery, #40503
SMITH LEWIS, LLP
Suite 200, City Centre Building
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
Phone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com

Thomas M. Byrne, #33340
Director – Asst. General Counsel
Wendy K. Tatro, #60261
Director- Asst. General Counsel
Ameren Services Company
P.O. Box 66149
St. Louis, MO 63166-6149
Phone (314) 554-2514
(314) 554-3484
Facsimile (314) 554-4014
amerenmissouriservice@ameren.com

L. Russell Mitten, #27881
BRYDON,SWEARENGEN & ENGLAND, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
Phone (573) 635-7166
Facsimile (573) 634-7431
rmitten@brydonlaw.com

ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

Dated: August 1, 2014

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2014, a copy of the foregoing was served via e-mail on all parties of record in File No. EC-2014-0224.

/s/James B. Lowery
James B. Lowery